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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 533.

WALTER H. FOSTER, ET AL., *Petitioners*

v.

GENERAL MOTORS CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING ON ORDER DENYING THE WRIT.

WEAVER & GLASSIE
THOMAS M. COOLEY II.
for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioners respectfully request a rehearing of their petition for certiorari, for the reason that a very recent decision of another Court of Appeals, rendered since the submission of all briefs herein, is in conflict with the decision below on the question of discrimination. This case is *Huffman* v. *Ford Motor Co.*, decided by the Court of Appeals for the Sixth Circuit on March 3, 1952. It has not yet been

reported officially but is reported at 21 Labor Cases ¶ 66,799 (advance sheets). Copies of the decision have been filed with the clerk for the convenience of the Court.

Huffman, for himself and some 275 other veterans, brought an action under the statute here involved, contesting a provision of a collective bargaining agreement. This provision gave to employees initially hired by Ford on their release from military service seniority credit for the time they spent in the armed forces. As a result, some of these newly-hired veterans acquired greater seniority than Huffman and other veterans who had worked for Ford before their military service. Huffman contended that the layoff of himself and his fellows prior to the newly-hired veterans, in accordance with the seniority so established, was discriminatory and illegal. The court held that the layoff was not a "discharge without cause" violating the reemployment statutes, because under this Court's *Fishgold* decision a layoff is not a discharge.

The court then considered the existence of discrimination, and held:

"We see nothing in this ruling [the *Campbell* case] which validates contracts made without regard for the protection of the interests of all members of the union. We think that action which results in widespread discrimination is not justified by the lack of definite malice or hostility. Well-meaning desires, not dishonest in the sense of expressing deliberate hostility, may at times, due to failure to consider all pertinent factors, result in discriminatory measures. The end result for Huffman and those similarly situated is the same as if there had been deliberate hostility. No evidence was presented on the question but we assume that both the union and Ford, in executing this bargaining contract, had a well-meaning desire to protect veterans who had had no chance for employment prior to their service in the armed forces. But in so doing they clearly discriminated against other veterans who had entered the military service when already employed by

Ford. We think such a contract is not authorized under the National Labor Relations Act.

"Section 157, 29 U. S. C., provides that employees have the right to bargain collectively and 'to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.' This means that in entering into labor contracts the bargainers must make their agreements with a view to the rights of the entire group bound by them, and not enter into agreements which discriminate against one part for the benefit of another. *Gauweiler* v. *Elastic Stop Nut Corp.*, 162 Fed. (2d) 448, 451 (C. A. 3). As pointed out in that case, which was approved by the Supreme Court in *Aeronautical Lodge* v. *Campbell*, supra, no discrimination existed against veteran employees. 'Discrimination,' the court declared, 'would obviously change the whole picture.'

"Under the National Railway Labor Relations Act just as under the Railway Labor Act the bargaining representative of the employees rests under the obligation to exercise fairly the power conferred upon it in behalf of all those for whom it acts without discrimination. Cf. *Steele* v. *L. & N. Rd. Co.*, 323 U. S. 192, 202, 203."

The test of discrimination is the same, whether under the National Labor Relations Act and the Railway Labor Act or under the reemployment statute, as the court determined by its grant of relief under the reemployment statute and by its discussion primarily of veterans' reemployment cases in this connection—the *Campbell, Whirls, Fishgold* and *Gauweiler* cases. The quotation above was the holding of the court, the necessary basis for its further conclusion that the contested provision was invalid because not based on a relevant difference among the employees. (Since the reemployment statute itself requires the difference between returning veterans and those who remained continuously in their civilian employment to be treated as irrelevant, this latter part of the *Huffman* decision is of no concern here.)

Thus the Court of Appeals for the Sixth Circuit holds that illegal discrimination occurs if there is widespread disadvantage to one group in favor of another, regardless of hostile motive or intent. On the other hand, the court below specifically rejected this test and held that returning veterans may suffer a disadvantage greater and more widespread than any other group, and a corresponding advantage may go to the employer in the form of savings or to other employees in the form of increased vacation pay, so long as there is no intent to discriminate. As the court said:

"We have not overlooked plaintiffs' contention that even though no opposing affidavits were filed by them, an issue of fact was raised by the allegations of their complaint. We think this contention is without merit. There is no allegation in the complaint that the agreement between the defendant and the union was made in bad faith and no allegations of fact which, in our view, could form the basis for any legal discrimination. The nearest approach is the allegation, 'By this device, nearly every veteran returning to General Motors' employ was deprived of vacation pay in 1946 because of his prior absence in military service,' and that plaintiffs 'were the victims of a unique rule discriminating against employees in the military service.' 'By this device' in the first quote and a 'unique rule' in the second quote refer to the agreement by which the earnings for 1945 were used as the basis for vacation pay in the year 1946. These allegations, in our view, raise no genuine issue as to a material fact. We suppose that none would disagree but that plaintiffs and other veterans were in numerous respects placed at a disadvantage when their lot is compared with that of their fellow employees who remained at home. Such disadvantages, however, are inherent in military service, although characterized as discriminatory are not discriminations for which the law affords a remedy. The discrimination, if such it be, asserted by the plaintiffs in the instant matter is not of

the character which the Act is designed to protect." (191 F. 2d at 912)

In the Sixth Circuit, the effects and operation of a provision, the burden it casts on a particular group of employees, is the measure of its validity; in the Seventh, these matters are irrelevant. Disputes of the kind giving rise to these cases will recur in future years, regardless of how long the veterans have been back in their civilian employment, as the nature of these disputes shows. The conflict in decision here is inescapable, and the question is far from moribund.

Because of this newly-developed conflict, petitioners urge the Court to reconsider the denial of certiorari and to grant the writ.

Respectfully submitted,

WEAVER & GLASSIE
THOMAS M. COOLEY II.
for Petitioners.

Certificate of Counsel.

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is grounded only upon the conflict between the decision below and a decision of a different Court of Appeals rendered subsequent to the submission of all briefs herein.

THOMAS M. COOLEY II.

See next page

SUPPLEMENT TO PETITION FOR REHEARING ON ORDER DENYING THE WRIT.

Subsequent to preparation of the petition for rehearing, a decision of the District Court of Minnesota was reported in the advance sheets of C. C. H. Labor Cases for March 27, 1952, and has just come to the attention of counsel for petitioners. This decision is *Rydberg* v. *Great Northern Railway Co.*, 21 Labor Cases ¶ 66,833 (decided December 13, 1951, Civil No. 2051 D. Minn., Third Division). It is directly contrary to the decision below on the escalator issue presented in the petition for certiorari.

The vacation pay provisions on the Great Northern, like that on practically all railroads, required that the employee render 160 days of compensated service in the preceding calendar year to be eligible for one week's vacation pay in the current year; to be eligible for two week's vacation pay, the employee must have rendered 160 days of compensated service in each of the five preceding years Rydberg was hired in 1943, worked steadily for 156 days and was then inducted. He returned in September 1944, missed little or no work, and worked 99 days that year. In 1945 and each succeeding year, he worked over 160 days. He claimed one week's vacation pay in 1945, and two weeks in 1949, on the theory that only his absence in military service prevented him from meeting the requirement of 160 days' compensated service in the preceding years.

The railroad moved to dismiss on the ground the complaint failed to state a claim upon which relief could be granted. In denying the motion, the court said:

> "The court's attention has not been directed to any pertinent decision by the Court of Appeals of the Eighth Circuit, and the court has found none. The difference in the conclusions arrived at in the Second (*Dwyer* and *Siaskiewicz* cases) and Third (*Mentzel* and *MacLaughlin* cases) Circuits suggests an element of speculation as to what is the appropriate disposition of the question of vacation pay in the cases at bar. All

doubts should be resolved with a thought to protecting the veteran, and as required by a liberal construction of the Act in question. (Citing *Fishgold* and *Karas* v. *Klein*, 70 F. Supp. 469)

"Motions to dismiss should not be granted unless it appears to a certainty that plaintiffs would be entitled to no relief under any state of facts in support of the claim set forth in the complaints (Citing *Sparks* v. *England*, 113 F. 2d 579 C.A. 8; *Turner* v. *U.S. Gypsum Co.*, 11 F.R.D. 545; and *R. O. Stenzel & Co.* v. *Department Store Package, etc.*, 11 F.R.D. 362) Thoughtful consideration is convincing that the plaintiffs have stated a claim justifying recovery upon required proof. The motion to dismiss in each case is denied, without prejudice to its renewal at trial.

The requirement of 160 days of compensated service is obviously much stronger in the employer's favor than the computation in the present case fixing the amount of vacation pay as a percentage of prior year's earnings; for the latter computation does not in any sense make the 1946 vacation pay compensation for work in 1945. (See note 1, page 6 of the original petition herein.) Yet the Minnesota court applied the escalator principle and held that plaintiffs had stated a cause of action, whereas the Seventh Circuit rejected the principle and dismissed petitioners' complaint on the ground it stated no cause of action. And even without an exhaustive examination of all the authorities, the conflict in decisions of Courts of Appeal was plain to the Minnesota court, for the court stated that "the difference in the conclusions arrived at by the Second and Third Circuits" warranted refusal to dismiss, in the absence of an authoritative decision in the Eighth Circuit.

A similar and confusing choice of conflicting precedents will continue to confront lower courts so long as this Court has not spoken. Only in the Circuits where the Court of Appeals has decided the point are the results predictable, and among these Circuits the principles are contradictory and the results opposing. Outside them, there can be no

predictability or uniformity, in vacation pay or other matters embraced in the escalator principle, until this Court has determined the correct rule of law.

THOMAS M. COOLEY II.

Certificate of Counsel.

This supplement to the petition for rehearing is based on a case reported only since the petition for rehearing was prepared. The petition for rehearing is limited to (a) the conflict between this case and the decision below and (b) the newly-developed conflict between Courts of Appeal set forth in the petition for rehearing, and is not submitted for purposes of delay.

THOMAS M. COOLEY, II,
Counsel for Petitioners.

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Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR REHEARING.

HUBERT HICKAM,
THOMAS M. SCANLON,
JERRY P. BELKNAP,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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RESPONDENT'S RESPONSE TO PETITION FOR REHEARING.

The petition for rehearing, as supplemented, is based on two decisions claimed to conflict with the decision under consideration here. The first such decision cited is *Huffman* v. *Ford Motor Co.* (C. A. 6, March 3, 1952), 21 C. C. H. Labor Cases, ¶ 66,799. That case was decided by a split court, and admittedly was a case *sui generis*. The bargaining contract there involved a seniority provision which gave all veteran employees seniority credit for their period of service in the Armed Forces regardless of whether the veteran had been an employee of Ford Motor Company when he went into the service or not. The contract was thus claimed and held to discriminate against veteran employees of Ford who had been in its employ before entering service and in favor of veterans with long service in the

Armed Forces who came into Ford's employ for the first time after the war. The majority stated the question presented thus:

> "* * * The question squarely presented is whether the union and management can by contract create preferential seniority in men not employed when they entered the armed services as against men, also veterans, who were employed when they entered the armed services." (21 C. C. H. Lab. Cas. 81,002.)

The court then discussed the fact that the provision was embodied in a collective bargaining contract and indicated that that fact was pertinent only if the contract provision was made for the protection of the union as a whole. The court then concluded:

> "* * * Where the discrimination arises is between veterans, like Huffman, who were employed, left their employment to enter the armed services and were reemployed, in conformity with the statute, and veterans not employed prior to war service. All such veterans who subsequent to June 21, 1941, have served a longer time in the armed forces than Huffman and those similarly situated are given *a preferential seniority under a contract provision which has no relevance to terms and conditions of work or the normal and usual subjects of contracts between union and employer.* * * *
>
> "While, as pointed out in *Aeronautical Lodge* v. *Campbell, supra,* there are variations in the use of seniority, such as plant seniority, shop seniority, seniority conditioned upon existence of a probationary period of employment, etc., we are cited to no case which approves the creation of seniority rights in a collective bargaining contract upon the basis of acts done or service rendered prior to entering upon the employment in which the seniority is claimed. We think this is 'superseniority' just as the seniority claimed in *Trailmobile Co.* v. *Whirls, supra,* was superseniority. It penalizes Huffman for working for Ford before his military service.

"Under the uncontradicted facts the seniority system as to Huffman and those similarly situated is discriminatory. Plainly a contract which, in case of layoff, prefers men without experience over men with experience, no other facts appearing and no other valid reasons for preference existing, is discriminatory. When an employee who entered the Ford plant in 1945 is retained in layoffs over Huffman, who entered in 1943, Huffman is discriminated against." (21 C. C. H. Lab. Cas. 81,003-4.)*

This review of the facts of that case amply demonstrates that it has no applicability here. Here it is petitioners who seek to claim a sort of superseniority by being given a preferred position in relation to vacation pay over nonveterans on furlough or leave of absence. The attacked provision of the collective bargaining agreement here was negotiated at length by the company and the union in the course of negotiations to end a long strike. As the court below described the situation:

"* * * A strike had long been in progress at the time such negotiations were commenced and carried on. Both the defendant and the union were charged by law, National Labor Relations Act, 29 U. S. C. A. § 151, *et seq.*, to bargain in good faith in an attempt to reach a satisfactory agreement. Defendant made numerous proposals which, if they had been accepted by the union, would perhaps have been more favorable to employees on a furlough or leave of absence. Such proposals, however, were rejected by the union.

"Certainly there is no basis on the undisputed facts to argue that the defendant did not bargain in good faith, and the fact that the union rejected the proposals as made by the defendant and insisted on a proposal, subsequently agreed to by the defendant, by which the earnings for 1945 were made the basis for vacation pay does not show that the union acted in bad faith. And this is so notwithstanding that such pro-

*All emphasis our own unless otherwise indicated.

> posal was less favorable to employees on a furlough or leave of absence than might have otherwise been obtained. After all, a union as an authorized bargaining agent no doubt is legitimately interested in obtaining the best possible contract for its members as a whole, and with numerous diversified interests among its members, especially, where its membership is large, there is nothing strange or unnatural if some segments of its membership are placed at disadvantage when compared with others. The strike had been in progress for 113 days, and it evidently was to the interest of both the defendant and its employees that it be terminated." (191 F. 2d 911; R. 116.)

As has been noted, the claim advanced in the present case has been presented to two different Courts of Appeals and has been found to lack merit. There is nothing in the ruling of the Court of Appeals for the Sixth Circuit in *Huffman* v. *Ford Motor Co.* that requires a different result.

In their Supplement to Petition for Rehearing, petitioners cite *Rydberg* v. *Great Northern Ry. Co.* (D. C. Minn., Dec. 13, 1951), 21 C. C. H. Labor Cases ¶ 66,833, as having some bearing on the application of the escalator principle here. The facts involved there are not set forth in the opinion. The actual decision was merely to deny without prejudice a motion to dismiss. It is thus difficult to determine just what principles the court was applying. It is worthy of note that in so far as the court discussed a supposed "difference in the conclusions arrived at in the Second and Third Circuits," the court overlooked the Third Circuit's decision in *Dougherty* v. *General Motors Corp.* (C. A. 3, 1949), 176 F. 2d 561, cert. den., 338 U. S. 956, which is the complete parallel to the decision of the Court of Appeals for the Seventh Circuit here involved. Under the circumstances, there is nothing in *Rydberg* v.

Great Northern Ry. Co. that can be claimed to be contrar to the decision here in question.

The petition for rehearing is without merit and shoul be denied.

Respectfully submitted,

HUBERT HICKAM,
THOMAS M. SCANLON,
JERRY P. BELKNAP,
Attorneys for Respondent

BARNES, HICKHAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.